No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM G. BARR, PETITIONER

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CITATIONS

Cases:

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The Solicitor General, on behalf of William G. Barr, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on June 12, 1958.[1] This judgment was entered after remand by this Court, by an order dated December 9, 1957 (355 U.S. 171), which vacated the judgment of the Court of Appeals of May 2, 1957, and directed that court to pass upon an issue not previously considered by it.

[1] Petitioner has been represented by the Department of Justice throughout this proceeding pursuant to 5 U.S.C. 309. See *Booth* v. *Fletcher*, 101 F. 2d 676 (C.A. D.C.), certiorari denied, 307 U.S. 628.

The cases were consolidated on appeal, by order of the Court of Appeals of March 26, 1956, because of the identity of the factual and legal issues (R. 42). A single petition is filed in accordance with Rule 23 (5) of the rules of this Court.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The original opinion of the Court of Appeals, dated May 2, 1957, as modified by its order of June 6, 1957 (App., *infra*, pp. 15-24) is reported at 244 F. 2d 767. The *per curiam* opinion of this Court, dated December 9, 1957, vacating the judgment of the Court of Appeals and remanding the case to that court for further consideration, is reported at 355 U.S. 171. The opinion of the Court of Appeals upon remand (App., *infra*, pp. 26-28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1958 (App., *infra*, pp. 29-30). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision.

STATEMENT

This is a libel suit instituted by respondents, former employees of the Office of Rent Stabilization, against petitioner, who was the Acting Director of that Office, based on matters contained in an official press release issued by the latter on February 5, 1953. The press release related to a then-current congressional inquiry concerning a terminal-leave plan which had been de-

vised by the respondents in 1950 for employees of the agency. The factual background of the case was summarized in the prior petition (No. 409, 1957 Term) and, for the convenience of the Court, will be set forth again here.

1. *The terminal-leave plan.* In May 1950, reduction-in-force notices were issued to personnel of the Office of Housing Expediter, an independent executive agency and the predecessor of the Office of Rent Stabilization, since the agency's statutory existence was about to expire. Respondent Madigan, who was Deputy Director in charge of personnel and fiscal matters, and respondent Matteo, chief of the personnel branch, devised a plan which was designed to utilize $2,600,000 (which had been earmarked in the agency's appropriation for the fiscal year 1950 exclusively for terminal-leave payments) as a means of conserving funds for future operational needs should the agency's life be extended (R. 14, 17). The purpose of the plan was to avoid a large terminal-leave carry-over into the next fiscal year which otherwise might have been paid out of the agency's general funds. The plan provided that employees of the agency would be discharged pursuant to the existing reduction-in-force notices, receive payment for accrued annual leave out of the terminal-leave appropriations, be rehired the following day as temporary employees, and be restored to permanent status if the life of the agency were extended (R. 14-15, 17).

Petitioner, who was then General Manager of the Office of Housing Expediter, was opposed to the plan on the ground that it violated the spirit of the so-called Thomas Amendment to the General Appropriation Act, 1951, 64 Stat. 768, which required government employees to use their annual leave within a specified time

and prohibited payments for unused annual leave accumulated during the calendar year 1950 (R. 15). The Housing Expediter decided against general adoption of the plan, but, when Mrs. Matteo advised him that some of the employees desired to take advantage of it, he gave permission for the plan to be utilized by any such volunteers (R. 18, 19). On June 23, 1950, Congress extended the authority of the Office of Housing Expediter to June 30, 1951, and two days later the terminal leave plan was put into effect for forty-nine employees of the agency, including the respondents (R. 14, 18, 21).[2]

2. *The press release.* On January 28, 1953, Senator John J. Williams of Delaware wrote to the Office of Rent Stabilization (successor to the Office of Housing Expediter) inquiring as to the 1950 terminal-leave payments (R. 19-20). The letter came to the attention of respondent Madigan, who prepared a preliminary draft of a reply to Senator Williams defending the plan (R. 20). The draft was not brought to the attention of petitioner, who was at that time the Acting Director of the agency (R. 16, 20). The letter was prepared in final form and sent to petitioner's office for his signature, but in his absence his name was signed by the Director's secretary and the letter was delivered to Senator Williams on the morning of February 3 (*ibid.*).

The following day, Senator Williams on the floor of the Senate delivered a speech criticizing the 1950 terminal-leave payments and requesting that the matter

[2] Respondent Madigan has since sued in the Court of Claims to recover the amount of terminal-leave payments due him under the plan. The Court of Claims recently held that the plan was not in violation of law. *Madigan* v. *United States*, No. 262-53, June 4, 1958. A motion for a new trial has been filed by the Government.

be investigated by a congressional committee (R. 3, 16). Senators Ferguson, Dirksen, and McCarthy joined in the denunciation of the leave payments as a "conspiracy to defraud the Government" and a "raid on the Treasury". 99 Cong. Rec. 868-71. These comments received wide publicity (R. 3, 4) and petitioner was questioned about the plan by newspapers and other interested parties (R. 16).

On February 5, petitioner advised the respondents that, because of the criticism of himself and the Office of Rent Stabilization, the adverse publicity, and the need to protect himself and safeguard the interests of the agency, he was going to take disciplinary action (R. 16, 20, 22). He thereupon served them with letters expressing his intention to suspend them on February 9, the date when his appointment as Acting Director became effective.[3] Contemporaneously, at petitioner's direction, the Office of Rent Stabilization issued the following press release which is the subject matter of this litigation (R. 5-6):

> William G. Barr, Acting Director of Rent Stabilization, today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.
>
> Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953 and the suspension of these employees will be his first

[3] Petitioner had been appointed Acting Director effective February 9, 1953, when the resignation of Director James Henderson was to become effective. When the press release was issued, petitioner was Acting Director by designation of Mr. Henderson, who was then absent from Washington (R. 24).

act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

"In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

3. *The proceedings below.* Shortly after the issuance of the press release, this suit was brought, charging that

the release was a malicious libel causing damage to respondents (R. 1-6). Petitioner's motion to dismiss the complaint on the ground of absolute privilege was overruled by the District Court on the authority of *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.) (R. 7). Petitioner then filed an answer (R. 8-9, 12-13), and a jury trial was held. After respondents had submitted evidence in support of their claim of liability, petitioner moved for a directed verdict on the grounds of (1) truth, (2) no defamatory imputation, and (3) qualified privilege. This motion was denied. The District Court also denied a motion for a directed verdict on the ground of absolute privilege. It refused to give instructions on the defense of truth and qualified privilege and instructed the jury to return a verdict for respondents if it found that petitioner's statements were defamatory. A verdict was returned in favor of respondents in the amounts of $6,500 and $2,000, respectively.

On appeal to the Court of Appeals for the District of Columbia Circuit, the sole issue raised by petitioner was whether the issuance of the press release was absolutely privileged (App., *infra*, p. 16). At the request of the Court of Appeals, and after argument, each party filed a memorandum on the question of whether the court could nevertheless consider the issue of qualified privilege. Petitioner urged that the question could be considered by the court under its Rule 17(i), which provides that "the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." The court concluded, however, that since the waiver was "informed and deliberate," the rule invoked on petitioner's behalf was not applicable

and the decision would be confined to the issue of absolute privilege (App., *infra*, pp. 17-19).

On the merits, the court (Judge Danaher dissenting) affirmed the judgment against petitioner. The majority opinion (by Chief Judge Edgerton, with Judge Fahy concurring) recognized that petitioner's decision to suspend respondents "probably [was] within his general line of duty," but held that petitioner "in explaining his decision to the general public * * * went entirely outside his line of duty" (App., *infra*, p. 16). The majority stated that, "if the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged" (App., *infra*, pp. 16-17), but that in this respect the Acting Director of the Office of Rent Stabilization was not different from the United States Marshal involved in *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.). The majority subsequently modified its opinion to declare that the principle of absolute privilege was not necessarily limited to cabinet officers but might include other officers who held comparable positions (App., *infra*, p. 24).

Judge Danaher, in dissenting (App., *infra*, pp. 19-22), stressed the fact that petitioner, as Acting Director of the Office of Rent Stabilization, had been delegated all of the powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, 61 Stat. 193. In Judge Danaher's view, the press release was no more than a declaration of policy by a policy-making executive with respect to a matter committed by law to his control or supervision.

Petitioner thereafter applied to this Court for a writ of certiorari, raising the question of whether the press release was protected by an absolute privilege (No. 409, 1957 Term). The Court granted the petition, vacated

the judgment of the Court of Appeals, and remanded the case to that court "with directions to pass upon petitioner's claim of a qualified privilege." 355 U.S. 171, 173. The Court ruled that the question of absolute privilege should not have been reached by the Court of Appeals without first considering the narrower defense of qualified privilege which might have been adequate to a disposition of the case. It was observed that "the defense of qualified privilege was consistently pressed in the District Court and in fact urged in the Court of Appeals itself." 355 U.S. at 173.

On remand, the Court of Appeals held that petitioner's statements were protected by a qualified privilege and that the privilege was not lost by an excessive publication or by a specific reference in the press release to the respondents (App., *infra*, pp. 26-28). However, it further held that there was sufficient evidence in the record to warrant submitting to the jury the questions of whether the privilege was lost by reasons of (1) malice or (2) lack of reasonable grounds for believing that the content of the publication was true. Since the District Court's treatment had made it unnecessary to submit these issues to the jury, the case was reversed and remanded "for further proceedings not inconsistent with this opinion." App., *infra*, p. 28.

REASONS FOR GRANTING THE WRIT

1. The first decision of the Court of Appeals in this case, denying petitioner the defense of absolute privilege, is a significant ruling in the increasingly important field of the immunity of federal officials from civil liability in defamation.

Our reasons for concluding that the decision merits

consideration by this Court were set forth in the petition to review that judgment (No. 409, 1957 Term). We asserted that the holding of the Court of Appeals —that the issuance of an official press release by the head of an independent agency of the executive department is not absolutely privileged—constitutes a departure from the consistent pattern of decisions of various lower courts according immunity to acts of government officers within the scope of their official authority, and that the holding conflicts with the principles of this Court's decision in *Spalding* v. *Vilas*, 161 U.S. 483, from which this pattern of cases has developed. We stated that the effect of the decision will be to hamper seriously the ability of policy-making officials below cabinet rank to engage in public discussion of the affairs of government, although those officials, in view of the present complexity of governmental operations, must of necessity constitute the major source of information concerning public affairs. In addition, we pointed out that the decision leaves the law in a state of confusion on a subject which has not received the attention of this Court since its decision in *Spalding* v. *Vilas, supra.*

The present decision of the Court of Appeals, remanding the case to the District Court for a new trial, underscores the importance of the case. For the decision now requires petitioner to do precisely what we have contended the rule of absolute immunity is designed to avoid, *i.e.*, litigate in a trial before a jury the question of his motivation in taking the official action which he deemed necessary to meet the responsibilities of his office. Furthermore, the Court has recently granted certiorari in a case involving the same basic issue although arising in a somewhat different context.

Howard v. *Lyons*, 250 F. 2d 912 (C.A. 1), certiorari granted, 357U. S. 903, No. 57, this Term. In *Howard*, the Court of Appeals for the First Circuit held that an executive officer below cabinet rank does not have absolute immunity with regard to the communication to interested Congressmen of copies of an official report addressed to his superior officers, despite the fact that the officer had been performing his executive functions in making the communication.

In this case, unlike *Howard*, the court below found that petitioner had gone "outside his line of duty" in issuing the press release. Perhaps in terms, therefore, the court adhered to the general principle that authorized acts are absolutely privileged. But it did so only by adopting an artificially restrictive test of "line of duty." It seems indisputable that petitioner was acting within the scope of his authority in giving full publicity to his agency's position on the terminal-leave plan and to the disciplinary action which he proposed to take. The issuance of press releases was a regular practice of the Office of Rent Stabilization.[4] The agency supervised and enforced federal rent control and operated pursuant to a very broad delegation of presidential authority. See 16 Fed. Reg. 7630. And as Director of the organization, petitioner had full responsibility for its internal management and control over its several thousand employees.

In *Spalding* v. *Vilas, supra*, this Court held that, in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed—*i.e.*, that the statements have "more

[4] See Rourke, *Law Enforcement Through Publicity*, 24 U. of Chi. L. Rev. 225, 233 (1957).

or less connection with the general matters committed by law to his control or supervision." 161 U. S. at 498-499. This was followed by the Court of Appeals for the District of Columbia Circuit in *Mellon* v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U. S. 530, holding that the release to newspapers of an official letter from the Secretary of the Treasury to the President was absolutely privileged although the President had not requested the report, for "it certainly was not beyond the scope of the Secretary's duty and authority to submit one." 18 F. 2d at 171. See also *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643.

Judged by these standards, petitioner's issuance of the press release was clearly within the scope of his authority. It follows, therefore, that this case squarely presents the same fundamental question now pending before the Court in *Howard*, namely, whether statements made by a federal officer below cabinet level, in performing the functions of his office, are absolutely immune from liability in defamation. The same considerations which prompted the Court to grant certiorari in *Howard* call for a like disposition of this petition.[5]

2. As already noted (*supra* pp. 8-9), this Court previously granted a petition for certiorari in this case, vacated the original judgment of the Court of Appeals, and directed that court to pass upon petitioner's claim

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[5] See also *Glass* v. *Ickes*, 117 F. 2d 273 (C.A. D.C.), certiorari denied, 311 U.S. 718; *United States* v. *Brunswick*, 69 F. 2d 383 (C.A. D.C.); *Farr* v. *Valentine*, 38 App. D.C. 413; *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167, appeal dismissed, 199 U.S. 616; *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R.I.); *Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N.D. Ill.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky.); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.); cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949.

of a qualified privilege, 355 U.S. 171. The Court ruled that the Court of Appeals had erred in holding petitioner to his original waiver of that narrowed defense. The reason for this disposition was that "this Court should avoid rendering a decision beyond the obvious requirements of the record." 355 U.S. at 172.

This procedural objection to further review of the case has now been removed, and the important question of absolute immunity now arises on the record. The Court of Appeals has considered the defense of qualified privilege on the basis of the record before it and has decided that the record does not permit a determination of the issue. The court found that there was sufficient evidence to go to a jury on the question of whether the qualified privilege had been lost by reason of malice or by lack of reasonable grounds for believing that the content of the publication was true. Accordingly, since the District Court had not submitted these questions to the jury at the first trial, the Court of Appeals directed that a second trial be conducted (App., *infra*, p. 28).

The present procedural posture of this case is thus identical to that of *Howard* v. *Lyons, supra.* (See the petition in No. 57, this Term, pp. 12-14.) In each case, the Court of Appeals has held that the federal officer did not have the benefit of an absolute privilege, that his statements were entitled to a qualified privilege, and that the case had to be remanded to the District Court for a jury trial on whether the privilege had been lost by abuse. In its prior order in the instant case, this Court did not direct that a second trial be conducted but only that the Court of Appeals attempt finally to dispose of the litigation on the narrower ground of qualified privilege, if possible. This the

court below has been unable to do, so that the important question of whether a federal officer must be subjected to a trial of his motives, in order to justify his official acts, is now squarely presented to this Court for decision.

CONCLUSION

For the foregoing reasons, and the reasons given in the petition in No. 409, 1957 Term, it is respectfully submitted that this petition for a writ of certiorari should be granted. However, in view of the similarity of the issue in this case to that in *Howard* v. *Lyons, supra,* the Court may deem it appropriate to withhold action on this petition until the *Howard* case is decided.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

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Assistant Attorney General.

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Attorneys.

SEPTEMBER 1958.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided May 2, 1957

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch,* United States Attorney, and *Joseph Langbart,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

EDGERTON, *Chief Judge:* In 1953 the defendant Barr was Acting Director of the Office of Rent Stabilization, a branch of the Economic Stabilization Agency. The head of the Agency was the Director of Economic Stabilization. The plaintiffs Madigan and Matteo were

employees in the Office of which the defendant was Acting Director. A terminal-leave plan which the plaintiffs had sponsored in 1950 was under criticism in Congress in 1953. The defendant had disapproved of the plan. Without his knowledge, his secretary signed the defendant's name to a letter to a Senator defending the plan. The plaintiff Madigan had drafted the letter. When the defendant learned that the letter had gone out over his signature, he issued a press release in which he said his first act of duty would be to suspend the plaintiffs, the officials responsible for the terminal-leave plan, and that although he "was advised" the plan was legal, he thought it "violated the spirit of the Thomas Amendment" and he "violently opposed it".

The plaintiffs sued the defendant for libel. The verdict and judgment were for the plaintiffs. The defendant appeals on the ground that he had an "absolute immunity or privilege" in publishing the press release.

We agree with the District Court in overruling that contention. The defendant's decision to suspend the plaintiffs for what he thought, mistakenly or not, was sufficient cause, and his execution of any documents appropriate to that end, were probably within his general line of duty. If so, a letter to his official superiors explaining his decision would also have been within his general line of duty. *Cf. Farr* v. *Valentine*, 38 App. D.C. 413. So would an explanation addressed to the plaintiffs or to their representative. *Newbury* v. *Love*, —— U.S. App. D.C. ——, —— F. 2d —— (Feb. 28, 1957). But in explaining his decision to the general public, the defendant went entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected. If the defendant had been a Cabinet

officer, his public explanation might have been absolutely privileged. "It has been held that a Cabinet officer is absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision.'" But this is because "Cabinet officers have political functions, and public interest is thought to require that they be not restrained by fear of libel suits from publicly explaining their acts and policies." *Colpoys* v. *Gates*, 73 App. D.C. 193, 194, 118 F. 2d 16, 17.* We held in that case that a United States Marshal was not absolutely privileged to defame his subordinates in publicly explaining his reasons for dismissing them. Neither, we think, was an Acting Director of the Office of Rent Stabilization.

In general, "When the author of a libel writes under the compulsion of a legal or moral duty, or for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins* v. *Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 84 U. S. App. D. C. 51, 54, 171 F. 2d 21, 24. In the District Court the defendant Barr claimed that if his press release was not absolutely privileged, it was qualifiedly privileged by reason of this principle. However, on this appeal he has waived this claim. His brief states the "Question Presented" as follows: "Whether the Acting Director of the Office of Rent Stabilization should be accorded absolute immunity in a suit for libel for allegedly defamatory statements made by him in a press release, issued on Thursday, February 5, 1953, announcing his intention

[* The opinion was later modified at this point. See pp. ——, *infra*.]

to suspend two named employees of the agency on Monday, February 9, 1953, and setting forth his reasons for taking that action." The entire "Statement of Points" in his brief is as follows: "The District Court erred in denying the defendant's respective motions to dismiss and for a directed verdict which were based on the defense of absolute immunity or privilege."

The waiver of the claim of qualified privilege was informed and deliberate. The appellant was represented by eminent counsel. An Assistant Attorney General of the United States, the United States Attorney for the District of Columbia, and two attorneys of the Department of Justice, all signed appellant's brief. All have now filed a memorandum which contains this summary of the matter: "Appellant's brief, in conformity with Rule 17 (c) (7), set forth in the Statement of Points only the contention that the District Court erred in denying appellant's respective motions based on the defense of absolute immunity or privilege. Similarly, the Question Presented posed only this question, and the brief discusses this case only in terms of the applicability of absolute immunity as a defense. Finally, counsel for appellant, on October 12, 1956, disclaimed in open court any intent to urge any error on the part of the District Court other than its failure to accord to appellant the defense of absolute immunity or privilege."

This court's Rule 17 (c) (7) requires that appellant's brief state "the points on which appellant intends to rely". Rule 17 (i) provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." This exception for "plain error" protects our authority to deal, in the interest of justice, with a point counsel have overlooked. In the absence of extraordinary circumstances the exception should not be

applied, in a civil case, to a point that eminent counsel, for strategic or other reasons, have deliberately chosen to waive. Accordingly we do not consider whether there was plain error in the District Court's rejection of the claim of qualified privilege.

Affirmed.

DANAHER, *Circuit Judge, dissenting:* Appellant was the duly appointed Acting Director of the Office of Rent Stabilization at the time of the alleged libel. "All powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, exclusive of section 208 (a), as amended, and delegated to the Economic Stabilization Administrator by Executive Order No. 10276, shall be exercised and performed by the Director of Rent Stabilization pursuant to Executive Order No. 10276 and except as otherwise provided by this order."[1]

The declaration of policy of such an executive, as contained in the challenged press release, seems to me to be absolutely privileged. The appellant, exercising by redelegation the President's own powers, was entitled to immunity.[2] The official act was within the scope of those powers. The occasion was such as justified his action. The subject of the release dealt specifically with general matters committed by law to his control or supervision.

Appellee Madigan had been Deputy Housing Expediter in charge of personnel budget and fiscal matters

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[1] Sec. 4 of GO 9—Organization for Rent Stabilization, 16 FED. REG. 7630.

[2] *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167, 178 (D.C. Cir. 1904); *Glass* v. *Ickes*, 73 App. D.C. 3, 117 F. 2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); *Mellon* v. *Brewer*, 57 App. D.C. 126, 18 F. 2d 168 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 530 (1927); cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

within the agency. Appellee Matteo had been responsible for all technical aspects of the personnel program including recruiting and classification, and had been adviser to the deputy for administration on procedures or policy matters. Mr. Madigan devised a plan, in which both appellees joined, whereby they "terminated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued as temporary employees, with the intent to convert back to permanent employees at a later date." Appellant's intra-agency opposition to the plan was known.

Members of Congress publicly attacked the plan. Earlier criticism had been crystallized in the Thomas Amendment.[3] Appellant told appellees on February 5, 1953 "that the plan had become public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency and myself I had to take disciplinary action against an act which I deemed improper."

Appellee Madigan two days earlier had prepared a letter to Senator Williams defending the plan. He did not attempt to see appellant about it, but forwarded the letter purporting to bear appellant's signature despite appellant's known opposition to the plan. Both appellees "took advantage" of the plan to use up the earmarked funds.

Appellant testified that he decided to take disciplinary action "because I felt there was no defense for

[3] § 1212, General Appropriations Act, 1951, 64 STAT. 768, provided in part: "No part of the funds of, or available for expenditure by any corporation or agency included in this Act * * * shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951 * * *."

the plan and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge."[4]

The defense of this case was conducted by the Department of Justice. In the District Court appellant's motion for directed verdict was based in part on the ground that "the press release was qualifiedly privileged." The suit in last analysis, I take it, may be viewed as one against the Government which undoubtedly through Congress will be asked to respond to the judgment. I doubt that Government attorneys possess the power to waive a defense which, if it had been asserted, might have prevailed here. Compare our opinion in No. 13245—*Newbury* v. *Love*, decided February 28, 1957, where we found absolute privilege, despite *Colpoys* v. *Gates*.[5]

I see no obstacle in the *Colpoys* case to the result which I believe is required here. The limited functions of a marshal in publishing a statement in connection with the resignation of two deputies are not to be confounded with a situation such as the instant case presents. Even in *Colpoys* we recognized that officers with policy-determining functions are in a different category, and privilege is shown to have been accorded to acts in the general line of duty.

To recapitulate: here the Acting Director's status and authority stemmed from the President himself. His Executive Order made this agency head, in his own division, a policymaker second only to the Economic Stabilization Director. Involved, as a matter of top interest, was a policy position with reference to a plan admittedly devised to "use up" $2,600,000

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[4] Cf. *Dickens* v. *International Brotherhood, Etc.*, 84 U.S. App. D.C. 51, 171 F. 2d 21 (D.C. Cir. 1948).

[5] 73 App. D.C. 193, 118 F. 2d 16 (D.C. Cir. 1941).

of public funds which had been earmarked for terminal leave. If the appellant thought the Madigan plan had been a perversion of an appropriation to ends beyond the intention of Congress in providing the funds, it was his duty to speak out. He was not alone in his appraisal of the untoward result. His press release did no more than seek to allay the serious challenge to the integrity of the agency and to attempt to restore a public confidence which the use of the plan had impaired. The subject matter was personal to him because his name had without authorization been affixed to an official letter which misrepresented his position. The whole congeries of occurrences, including the position the Acting Director intended to take with reference to the problem, became of vital concern to the public. Under such circumstances, the press release was entitled to the status of privilege.

We need not, indeed I do not seek to, relax the rule which regards a cabinet officer as "absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision,'"[6] I think we should hold only that this officer, on the facts here disclosed, acting in the name of the President and exercising, by redelegation, powers conferred upon him by statute, and possessed of policy-making functions, is immune on account of a policy statement issued within the scope of his authority as to a matter committed by law to his control.

In this view, I think the judgment should be reversed.

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[6] *Colpoys* v. *Gates*, *supra note* 5, 73 App. D.C. at 194, 118 F. 2d at 17, citing *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957. *C. A. 3221-53*

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

April Term, 1957. *C. A. 3221-53*

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said District Court appealed from in these cases be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party in these cases shall bear his own costs on these appeals.

Dated: May 2, 1957.

Per Chief Judge EDGERTON.

Separate dissenting opinion by Circuit Judge DANAHER.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge*, and FAHY, in Chambers

ORDER

It is ORDERED by the Court that the opinion of this Court in the above cases be modified by striking the following words beginning on the fifteenth line of the third page:

"We held in that case"

and by inserting in lieu thereof the following words:

"We do not suggest that this principle is limited to Cabinet officers. We have no present occasion to consider whether it would apply, *e.g.*, to the Director of Economic Stabilization, who was appellant's official superior, or to the Chairman of the Atomic Energy Commission, or to other officers whose positions are comparable to those of Cabinet officers. Appellant's position was not of that sort. We held in *Colpoys*"

Per Curiam.

Dated: June 6, 1957.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge,* PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges,* in Chambers

ORDER

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: June 6, 1957.

Circuit Judges WASHINGTON, BASTIAN, and BURGER did not participate in the foregoing order.

Circuit Judge MILLER would grant the petition.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, APPELLANT,

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT,

v.

JOHN J. MADIGAN, APPELLEE

On Reargument Pursuant to Remand by the Supreme Court of the United States

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Decided June 12, 1958

Mr. Paul A. Sweeey, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Joseph Langbart*, Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

Before EDGERTON, *Chief Judge*, and FAHY and DANAHER, *Circuit Judges*.

PER CURIAM: The case is before us a second time. In our earlier decision, *Barr* v. *Matteo*, 100 U.S. App. D.C. 319, 244 F. 2d 767, where the facts are set forth more fully, we held that appellant, defendant in the District Court, could not successfully defend the libel suit of appellees, plaintiffs, on the basis of an absolute privilege. For reasons stated by the majority we did not pass upon the District Court's rejection of appellant's claim of a qualified privilege. The Supreme Court granted certiorari and remanded the case to us "with directions to pass upon petitioner's claim of a qualified privilege." *Barr* v. *Matteo*, 355 U.S. 171, 173. On this remand the case has been briefed and argued again.

A qualified privilege exists "when a communication relates to a matter of interest to one or both of the parties to the communication and when the means of publication adopted are reasonably adapted to the protection of that interest." *Blake* v. *Trainer*, 79 U.S. App. D.C. 360, 362, 148 F. 2d 10, 12. We now hold that appellant had a qualified privilege as Acting Director of the Office of Rent Stabilization to publish a defense of his conduct and that of his organization.

Several questions remain. One is whether appellant stayed within his qualified privilege or lost it by excessiveness of publication of the press release in suit. As to this we think that in view of the widespread public nature of the criticism of the Agency the scope of dissemination of the press release was not excessive. Another question is whether the qualified privilege which otherwise existed did not apply because the press release was aimed at appellees rather than at the source of the criticism of the Agency, which was in the Congress of the United States. We think that appellees were so connected with the subject matter of the press release that reference to them did not destroy the privilege. This situation is different from those cited

by appellees where the defendants seem to have gone out of their way to libel the plaintiffs.[1] See *Etchison* v. *Pergerson*, 88 Ga. 620, 15 S.E. 680.

This brings us to the questions whether appellant lost the privilege (1) by reason of malice or (2) lack of reasonable ground to believe that the content of his publication was true; or both. These are jury questions, as to which we hold there was sufficient evidence to go to the jury. Since they were not submitted to the jury our reversal will be accompanied by a remand for further proceedings not inconsistent with this opinion.

It is so ordered.

[1] *Merchants' Ins. Co.* v. *Buckner*, 98 Fed. 222, 232 (6th Cir.); *Williams* v. *McManus*, 38 La. Ann. 161, 58 Am. Rep. 171.

Filed June 12, 1958. Joseph W. Stewart

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

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LINDA A. MATTEO, APPELLEE

April Term, 1958

C. A. 3221-53

No. 13218

WILLIAM G. BARR, APPELLANT,

v.

JOHN J. MADIGAN, APPELLEE

On Reargument Pursuant to Remand by the Supreme Court of the United States

Before: EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

JUDGMENT

Pursuant to the judgment of the Supreme Court of the United States dated December 9, 1957, these cases came on for reargument on the record from the United States District Court for the District of Columbia, and were reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court:

It is further ORDERED by the Court that each party in these cases shall bear its own costs on these appeals.

Dated: JUNE 12, 1958.

PER CURIAM.
(S.) C. F.

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